No. 15169

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner and Cross-Respondent,*

*vs.*

JACK LEWIS and JOE LEVITAN dba CALIFORNIA FOOTWEAR COMPANY, and TRINA SHOE COMPANY,

*Respondents and Cross-Petitioners.*

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**On Petition for Enforcement of, and Petition to Set Aside, an Order of the National Labor Relations Board.**

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## BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS.

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RICHARD A. PERKINS,
411 West Fifth Street,
Los Angeles 13, California,
*Attorney for Respondents and Cross-Petitioners.*



The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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### Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order, as stated in the Board's brief (p. 1) and also upon the respondents' cross-petition to set the order aside. [R. 374.][1] By virtue of Section 10(e) of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*), hereinafter referred to as

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[1]"R." designates the printed record herein.

"the Act,"[2] this Court has jurisdiction to set aside the Board's order in whole or in part. As stated in the Board's brief, no jurisdictional issue is presented.

## Statement of the Case.

Following the customary procedure, in which the Board resolved almost all evidentiary conflicts in favor of its own witnesses, the Board made an order which would require respondents to bargain collectively with United Shoe Workers of America, Local 122, C.I.O., hereinafter called the Union, to offer reinstatement to one Piasek, to pay back pay to him and another, Roark, and to cease and desist generally from committing alleged unfair labor practices. [R. 142-145.] The Board's Acting Chairman dissented from the order to bargain with the Union and the back pay order as to Roark. [R. 146-157.]

The Board's order was made on the basis of a Trial Examiner's findings [R. 27-122] as adopted and modified by the Board. [R. 131-142.]

While the respondents do not concede and in fact deny the accuracy of the Board's findings, for practical reasons respondents here contest only those portions of the Board's order which are of current importance to them. Respondents offered reinstatement to Piasek, who declined it, and respondents are willing to post a proper cease-and-desist notice. What is left is the Piasek and Roark back pay order and the order to bargain with the Union.

The Board found that respondent Trina Shoe Company, a corporation, acted as the *alter ego* of respondent

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[2]Certain relevant portions of the Act are set forth in the appendix to the Board's brief, others in Appendix A to this brief.

California Footwear Company, a partnership, although they had different ownership [R. 33-34] and Trina is shown to have had an independent existence both before and after its business relationship with California. [R. 34, 120.] Respondents concede that there is some evidence which, if believed, would support the Board's *alter ego* finding, and respondents do not contest it.[3]

In general, respondents contend that the order to bargain and the Piasek and Roark back pay orders and the findings upon which they are based are not supported by substantial evidence on the record considered as a whole, and hence should be set aside under Section 10(e) of the Act.

In addition, respondents contend: (1) that the order to bargain is unauthorized under the Act because it would in effect preserve to the Union a privileged status as collective bargaining representative, which status the Union attained or kept with the assistance of unfair labor practices for which other employers and unions are prosecuted; (2) that by the order to bargain the respondents here were subjected to unfairly discriminatory treatment in comparison with other employers, whereby the order was arbitrary and capricious within the meaning of Section 10(e) of the Administrative Procedure Act[4] and denied these respondents due process of law; and (3) that the findings of discrimination as to Piasek and the order to pay him back pay was likewise arbitrary and capricious and a denial of due process.

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[3]Respondents do not, however, concede the occurrence of the supposed conversations which the Trial Examiner imagined [R. 43, 88] to have taken place between Lewis, a partner in California, and Fellman, an officer of Trina, to justify a finding of discrimination against Roark.

[4]5 U. S. C. A., Sec. 1010(e): Appendix A to this brief.

## Summary of Argument.

I. The order directing respondents to bargain with the Union as exclusive representative of employees is not supported by substantial evidence on the record considered as a whole.

II. The order directing respondents to bargain with the Union is unlawful because it would have the effect of conferring privileged status on a labor organization unlawfully assisted by means of compulsory union membership contract provisions which constituted an unfair labor practice denounced by the Act.

III. The order directing respondents to bargain with the Union is arbitrary and capricious and would deny respondents due process of law because it would unfairly discriminate against them in comparison with other employers, who are not required to continue recognition of a labor organization after it loses majority status in consequence of a plant removal dictated by economic considerations.

IV. The order to pay back pay to Roark is not supported by substantial evidence on the record considered as a whole.

V. The order to reinstate Piasek with back pay is not supported by substantial evidence on the record considered as a whole, is arbitrary and capricious, and constitutes denial of due process of law.

## ARGUMENT.

### I.

### The Order Directing Respondents to Bargain With the Union as Exclusive Representative of Employees Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

Prior to a date early in 1953[5] California conducted manufacturing operations at a plant on Los Angeles Street in the City of Los Angeles. [R. 33, 58.] On August 20, 1951, the Board certified the Union as collective bargaining representative of California's employees. On September 27, 1952, California entered into a contract with the Union effective for one year from October 1, 1952, and renewable annually in default of notice to terminate it. [R. 32-33.]

As the Trial Examiner found [R. 35]:

> "California's Los Angeles lease was due to expire in February, 1953. Its lessor, who was asking an increase in rent from $288, to about $342 per month, turned down Lewis' offer of $300. Because of this and because of poor health and advice of his doctor to 'take it easy' as much as possible, Lewis, who lived in Santa Monica, decided to locate the plant closer to his home."

Late in November, 1952, California leased premises in Venice, California,[6] for a term to begin January 1, 1953; thereafter California subleased a portion of the new location to Trina for manufacturing purposes and retained

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[5]The record does not show the exact date on which California's Los Angeles operations ceased. [R. 58.]

[6]Venice is now a portion of the City of Los Angeles, being about 15 miles across town from Los Angeles Street. [R. 138.]

the rest for its own merchandising operations. [R. 35-37.] The Board's findings concede that the plant was moved "for economic reasons." [R. 135.]

Trina began manufacturing operations at the Venice plant early in 1953. Some of the employees hired there had formerly worked at California's Los Angeles plant; others had not.

In order to qualify as exclusive bargaining representative and hence to be beneficiary of a Board order to bargain, a labor organization must have been designated as such representative by a majority of the employees in an appropriate collective bargaining unit under Section 9 of the Act. The Board's General Counsel tried, but failed, to prove that the Union had a majority of the employees at the Venice plant [R. 60-66, esp. p. 66, n. 22] and the Board's findings concede that when the plant was removed from Los Angeles to Venice the Union suffered a "loss of majority status." [R. 139.]

The Board assumes that the Union had a valid majority at the time the Los Angeles plant shut down and finds that unlawful refusals to bargain occurred, first, in connection with the shutdown and removal of the Los Angeles plant, and later in connection with the Venice manufacturing operations. The Board attributes the Union's lack of majority status in the Venice plant to unfair labor practices. [R. 136-139.] Both the Board's basic assumption and its findings lack substantial support in the evidence.

In the Los Angeles plant the Union was the beneficiary of a contract which illegally imposed compulsory Union membership on employees. [R. 68-69; Sec. 8(a)(3) of the Act.] At least four of the employees are shown to have dropped out of the Union after this restraint was removed. [R. 86.] The record does not show what happened to the others, although it may be assumed that Roark and Rosenthal, who testified for the Union and in support of their back pay claims, remained under Union discipline.

Since the Union's majority status in the Los Angeles plant was maintained by illegal compulsory union membership contract provisions, it is doubtful whether even in that plant the Union was entitled to continued recognition. According to a principle which the Board has successfully urged upon this Court, once a labor organization has benefited by such illegal assistance the employer is bound to withdraw recognition from it and cease dealing with it until it has been able to re-establish its majority status by legitimate means. See *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), 206 F. 2d 730, 734, cert. den. 346 U. S. 937.

So far as operations at the Los Angeles plant are concerned, the Board's finding of refusal to bargain boils down to the complaint that California refused to discuss with the Union the transfer of employees to the Venice plant. (Bd. Br. pp. 9-10.) The evidence which Board counsel cite in support of that is to the effect that a Union official, Tutt, visited the Los Angeles plant in January, 1953, and spoke to Lewis, who confirmed the reported

plan of closing the Los Angeles plant and informed him that Fellman, president of Trina and formerly an employee of California, was going to operate a new plant in Venice. Tutt mentioned his desire to have as many employees of the Los Angeles plant as possible re-employed at Venice, whereupon Lewis said he had nothing to do with that and referred Tutt to Fellman. [R. 193-195, 265-266.] So far as the record discloses, Tutt never did take the matter up with Fellman; although they met several times in the first few months of 1953 the topic was always that of Union contract and Union recognition [R. 195-206]; meanwhile Fellman had hired several former employees of the Los Angeles plant. [R. 86.]

Lewis' refusal to discuss the transfer of employees to Venice and his referral of the inquiry to Fellman did not constitute a refusal to bargain. Whether Trina is considered an independent enterprise or the *alter ego* of California, Fellman was authorized to and did hire employees for the Venice plant; he was certainly authorized to discuss the matter. In collective bargaining both sides are entitled to select their own representatives and neither side has the right to choose who shall negotiate for the other. There is nothing to the assertion that a refusal to bargain occurred when Lewis referred the Union official to Fellman at the Venice plant.

There was, of course, a refusal to bargain with the Union as exclusive representative of employees of the Venice plant after it opened. There, however, the Union never attained majority status. The Board assumes that

but for the alleged refusal to bargain which it found to have occurred at the Los Angeles plant, enough employees would have transferred from Los Angeles to Venice to provide the Union with majority status at the latter location. [R. 139.] Such an assumption would be implausible at best. Here, however, there was no refusal to bargain in connection with the closing of the Los Angeles plant, so that the whole foundation of the Board's argument is lacking.

As applied to the Venice plant the Board's order to bargain would require the employer to deal exclusively with a minority labor organization as exclusive representative of employees. That order would not effectuate, but would rather frustrate, the Act's majority rule principle: Section 9(a).

The Board argues that California's labor contract of September 27, 1952, remained in effect and was applicable to Venice plant operations so as to entitle the Union to continued recognition there. But the Board does not have jurisdiction to adjudicate contract rights, the determination which is confided to the courts[7] and could not be referred to an administrative agency in view of the Seventh Amendment guarantee of trial by jury. In any event, the contract illegally assisted the Union, for reasons which are more fully discussed below, and respondents' failure to accord continued recognition to the Union thereunder cannot be found an unfair labor practice.

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[7]Section 301(a) of the Act.

## II.

## The Order Directing Respondents to Bargain With the Union Is Unlawful Because It Would Have the Effect of Conferring Privileged Status on a Labor Organization Assisted by Means of Compulsory Union Membership Contract Provisions Which Constituted an Unfair Labor Practice Denounced by the Act.

The labor contract between California and the Union required employees to become Union members within 30 days after hiring and required newly hired inexperienced workers to get work permits from the Union within two weeks of their employment. [R. 68.] These provisions were illegal under Section 8(a)(3) of the Act. On this point respondents' counsel cannot improve upon the argument which Board counsel successfully urged against him in this Court in another case: *N.L.R.B. v. L. Ronney & Sons Furniture Manufacturing Co.* (C. A. 9), 206 F. 2d 730, cert. den. 346 U. S. 947. Accordingly, appropriate excerpts from the Board's brief in the *Ronney* case are set forth in Appendix B of this brief.

In the *Ronney* case the mere execution of such a contract was deemed such a grave offense that the contracting union was disqualified to serve as employees' bargaining representative until such time as it had won an election to establish its right to represent employees. In the instant case, however, respondents were denounced for abandoning such a contract and ordered to bargain with the union which benefited by it.

The Board's power under the law is broad, but it is not authorized to exempt a privileged labor organization from the requirements of the statute or to make an order which will perpetuate the coercive effect of illegal compulsory union membership contract provisions.

## III.

## The Order Directing Respondents to Bargain With the Union Is Arbitrary and Capricious and Would Deny Respondents Due Process of Law Because it Would Unfairly Discriminate Against Them in Comparison With Other Employers, Who Are Not Required to Continue Recognition of a Labor Organization After It Loses Majority Status in Consequence of a Plant Removal for Economic Reasons.

As the dissent of the Board's Acting Chairman pointed out, in making its bargaining order in this case the majority of the Board departed from the rule established in a North Carolina case[8] and were "establishing a different rule for employers in California." [R. 152.] The majority in the instant case attempted without success to distinguish the North Carolina case. [R. 137-139, 148-152.]

National uniformity of our fundamental labor relations law is universally recognized as desirable and indeed is the manifest purpose of the federal Act. To accord different treatment to similarly situated employers in different parts of the country is arbitrary and capricious administrative action which should be set aside under Section 10(e) of the Administrative Procedure Act and the Fifth Amendment.

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[8]*Matter of Brown Truck and Trailer Mfg. Co.,* 106 N.L.R.B. 999.

## IV.

## The Order to Pay Back Pay to Roark Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

The Board ordered respondents to pay back pay to Blanche Roark on the theory that she was discriminated against "both at the time of her employment at the Los Angeles plant was terminated and on February 5, 1953, when she was denied employment at the Venice plant." [R. 140-141.]

It was not found "that the termination of Roark's employment at the Los Angeles plant was itself discriminatory"; rather, it was found "that discrimination occurred at that time when Roark, for discriminatory reasons, was not offered a continuation of employment at the new plant." [R. 141.] The Board adopted the Trial Examiner's finding "that Roark was one of a group of five employees that Fellman told Lewis he would like to have at the Venice plant if available, and *that if he had not been adversely influenced by Lewis he would have made arrangements to take her to Venice.*" [R. 141.] (Emphasis supplied.) But there is not a scintilla of evidence in the record to support the above italicized portion of the Board's findings, which is more speculation and surmise. The Board's brief (p. 31) repeats the same assertion but cites no evidence to support it; the only record references given [R. 91, 141] are to the Trial Examiner's report and the Board's decision.

Fellman gave the only testimony concerning any discussion between himself and Lewis on the subject of the transfer of employees from Los Angeles to Venice. He remarked to Lewis that there were certain employees at the Los Angeles plant "who, if they could be available, I

would like to have out there at Venice." [R. 292.] Fellman mentioned Roark, Morris, Quesenberry, Hernandez, and Estrada. [R. 292-293.] Fellman did not recall any response on the part of Lewis. [R. 293.] Of the five mentioned, Fellman invited only Quesenberry and "probably" Hernandez to go to Venice. [R. 86.] Estrada was not invited but did go to work at Venice. [R. 86.]

From the foregoing it appears that although Fellman mentioned five employees as prospects for transfer he did not invite more than two of them. His failure to invite Roark did not single her out for special treatment. And Fellman's failure to invite an employee to come to Venice did not indicate any determination on his part to discriminate against the employee, for although Estrada was not specially invited he was hired when he applied for work at Venice. Lewis is not shown to have had anything to do with Fellman's decision whether or not to invite employees to Venice or whether or not to hire them if they showed up without invitation. Thus the Board's finding of discrimination against Roark in failing to invite her to Venice is without foundation.

The finding of discrimination in failing to hire Roark when she applied at the Venice plant is likewise unsupported by substantial evidence. Roark's last job at the Los Angeles plant was that of platform stitcher. [R. 84.] On February 5, 1953, she applied to Fellman at the Venice plant for work as a platform stitcher. [R. 156.] Oster, chief Union shop steward at the Venice plant [R. 206] and another employee, Murray, were then sharing whatever platform stitching was needed and they did other work as well; there was never enough platform stitching to require the services of more than one employee. [R. 87.]

As Acting Chairman's dissent noted, "for Roark to have been employed as a platform stitcher, the Respondent would have had to displace Oster or Murray, or both of them . . . certainly the law does not require the Respondent, in order to avoid a charge of anti-union discrimination, to transfer incumbent employees to less favorable positions in order to accommodate prounion applicants . . . the Respondent's position in this regard was both reasonable and sound. The Board has no right to substitute its concept of business management for that of the employer." [R. 156-157.]

The Board asserts that work was available when Roark applied. [Bd. Br. 15, R. 142.] That finding is based on a portion of Fellman's testimony [R. 85, 294] although the Trial Examiner and the Board believed Roark's conflicting version [R. 85, 132-133.] Fellman testified that he offered Roark a job, intending to use her to replace Murray or Oster, but that she was not then ready to go to work and that by the time she again inquired Oster had been given the only full-time job as platform stitcher. [R. 85, 87.] The only work which was "available" when Roark applied was work which was then being done by Oster or Murray. As stated above, respondents had no obligation to displace either of them to provide a job for Roark. Fellman testified that he offered Roark a job but that she was not ready to take it [R. 85]; Roark testified that he put her off, promised to telephone her, and then failed to do so. [R. 84.] It does not matter which version is believed, for in any event respondents were not obliged to displace anyone then working in order to provide employment for Roark. Their failure to do so was not discriminatory.

## V.

## The Order to Reinstate Piasek With Back Pay Is Not Supported by Substantial Evidence on the Record Considered as a Whole, Is Arbitrary and Capricious and Constitutes Denial of Due Process of Law.

The order to reinstate Piasek with back pay is based on the finding that respondents unlawfully discriminated against him by discharging him November 17, 1953. [R. 116.] There is no evidence of any discharge of Piasek on that or any other date.

Piasek was hired at the Venice plant as a cutter on April 6, 1953. [R. 104-105.] At that time the Venice plant had another cutter, Rosenthal, who had previously worked at the Los Angeles plant and was a member of the Union. [R. 98-99.] Rosenthal was laid off April 28, 1953.

The hearing before the Board's Trial Examiner began October 13, 1953, on the basis of an amended consolidated complaint which alleged among other things that on April 28, 1953, "Respondents, and each of them, discriminatorily discharged" Rosenthal "to discourage membership in the Union" and that by that and other acts "Respondents, and each of them, did engage in and *are engaging in* unfair labor practices within the meaning of Section 8(a)(3) of the Act." [R. 6-7.] (Emphasis supplied.) If the Board has found the allegations of its complaint to be true with respect to Rosenthal it would no doubt have ordered respondents to reinstate Rosenthal with back pay, for that is the conventional remedy prescribed in such cases. Respondents denied the essential allegations of the complaint [R. 9-14], and the proceeding went to trial on the issues so joined.

During the presentation of the Board's case its General Counsel adduced evidence on the basis of which he argued that Rosenthal had been the victim of unlawful discrimination when he was laid off April 28, 1953, and Piasek was retained. [R. 98-103.] After the prosecution rested, respondents moved to dismiss the complaint with respect to Rosenthal for lack of substantial evidence. The General Counsel opposed the motion and it was denied; the Trial Examiner indicated his belief that a *prima facie* case had been made out as to Rosenthal. [R. 29, 247-253.] (When the Trial Examiner issued his intermediate report and recommended decision April 28, 1954, he recommended dismissal of the complaint as to Rosenthal [R. 126], but of course respodnents had no way of knowing in November 1953 that that would happen.)

Respondents' defense to the complaint of discrimination against Rosenthal embraced two contentions. In the first place, respondents contended that although junior to Rosenthal in point of seniority, Piasek was retained because he was more experienced in cutting leather, which the plant sometimes used in addition to plastics, felt, and compositions. [R. 99-103.] Secondarily, respondents contended that even if Rosenthal were found to have suffered discrimination April 28, 1953, any obligation on their part to reinstate him and pay him back pay was cut off when he refused an offer of reinstatement about a month later.

At the instance of the General Counsel, Rosenthal testified on direct examination that about a month after his layoff he received a telegram asking him to come back to work and that he was working on something else at the time but that he went to the plant and told Lewis and Fellman "that I was tied up right now and I would know

in two or three days whether I would come back to work, and if they could use me at that time, if this deal that I was working on did not materialize, I would go back to work." Rosenthal further testified: "Three days later I did come back and said that my deal fell through and I wanted to go back to work. Mr. Fellman told me at that time that there was no work, that they needed me three or four days ago but not now." [R. 241-242.]

Despite this testimony, the General Counsel did not then concede that Rosenthal's right to reinstatement and continuing back pay was cut off by the offer which was made him.[9] Although respondents believed that their offer to Rosenthal should relieve them of further responsibility to him they had no reason to suppose that the prosecution agreed with them. (They contended that they had made an offer to Roark in February 1953 [R. 84-85] but they were ordered to pay her back pay to November of that year). [R. 120.] The General Counsel questioned the good faith of the offer to Rosenthal, complaining that it was made merely to stop the running of back pay. [R. 104, 249.] In a colloquy with counsel November 23, 1953, the Trial Examiner tentatively hazarded the view that "once an offer is made to reinstate, as it was in this case, that may be argued to be a complete exculpation and that even though there might have been a job for such a person, the respondent might, *perhaps justifiably,* refuse to offer to Rosenthal, who previously refused to accept or had not accepted, at least." (Emphasis supplied.) [R. 248.] The Trial Examiner cautioned

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[9]The concession was not forthcoming until December 4, 1953, and was evidently made then in order to support a new charge of discrimination against Piasek. [R. 364-365.]

counsel "That is a matter, however, that I am not prepared to answer at the present time. I am not sure what that cases may show on that." [R. 249.] The Trial Examiner asked Board counsel if he had any cases on the subject and received reply "Well, no, I would consider that a factual problem . . ." [R. 249.] Later, the Trial Examiner pointed out that even after the offer to Rosenthal, "a new unfair labor practice might have arisen if the Respondents, having work for him, discriminatorily refused him employment a few days later when he offered his services." [R. 113.] The Trial Examiner correctly found that "Respondents' counsel had, before December 4, 1953, some reason to believe that the General Counsel was not conceding that Rosenthal's right to reinstatement was cut off in May, 1953." [R. 112.]

Respondent's counsel had reason to fear that what appeared to be a refusal of an offer of reinstatement might be viewed otherwise by the Board. In *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), 206 F. 2d 730, 737-738, the employer, represented in this Court by the same counsel, was ordered by the Board to reinstate an employee (Sendejas) and pay him back pay for a period long after he had refused an offer of reinstatement; this Court set aside that portion of the order.

Thus it was that in November 1953 respondents were defending against a prosecution which charged them with discrimination against Rosenthal in favor of Piasek. Piasek worked at the Venice plant intermittently from April 3 to November 4, 1953. [R. 104-106.] He was laid off on November 5 and 6 but was told to report back for work on November 9 and, so far as the record discloses, he may have done so. [R. 117.] Piasek sat around

the hearing room November 10, 11 and 13, and then testified November 16. (He was supposedly waiting all that while to be called as a witness for the prosecution [R. 107-109] but he was probably an interested spectator as well, for it is unlikely that the Government would be so wasteful of the time of a man who wanted to work.) On November 13, Lewis asked Piasek if he would be able to start cutting on Monday the 16th. Piasek replied that he would if he were called to testify that day (Friday) but otherwise he would start working on Tuesday. Lewis knew on November 13, when he asked Piasek to come back to work, that Piasek planned to testify against respondents [R. 108.]

Until November 23 the Venice plant did no cutting, except for what one Zell may have done. [R. 117.] Piasek went to the plant November 17 but was told that he was not then needed and would be called when wanted. [R. 313.]

Respondents conferred with counsel at the Venice plant on the weekend of November 21, after the General Counsel had rested his case. [R. 110.] A cutter was needed for the following Monday, November 23. Acting on the advice of counsel, respondents recalled Rosenthal to work instead of Piasek. [R. 114-115.] On Monday, November 23, respondent's counsel announced at the hearing that Rosenthal had been taken back [R. 247-248] and asked the Board's counsel if he had any objection, but he declined to answer. [R. 255-260.] It was not until December 4, 1953, that Board counsel finally decided that Piasek should have the job rather than Rosenthal. [R. 364-365.] Subsequently, a supplemental complaint was issued on the basis of Piasek's replacement by Rosenthal

[R. 19-21] and in due course the Board ordered Piasek to be reinstated with back pay. [R. 144.]

The Board's position appears to be that in acceding to the Board's then apparent desire to have Rosenthal reinstated in the single cutter job respondents committed an unfair labor practice. Both Rosenthal and Piasek were Union members and both had testified against respondents. At the time Rosenthal was taken back he, but not Piasek, had preferred unfair labor practice charges against respondents and was seeking to recover back pay from them.

It appears to be the Board's contention that in their decision to reinstate Rosenthal to the single cutter job respondents were not motivated solely by a desire to comply with the Board's apparent wishes and minimize their back pay liability. The suggestion apparently is that in thus complying with what the Board apparently wanted respondents were too much consoled by Piasek's departure, and that cheerful compliance with the Government's position was somehow wrong and must be treated as an unfair labor practice lest the disciplinary purpose of the prosecution fail of achievement.

The Board's position is absurd, of course. It may be assumed that after Piasek had shown himself dissatisfied with his conditions of employment [R. 312] respondents had less reason than before to wish to protect him in his job in the face of the Board's contention that respondents had committed an unfair labor practice in preferring him to Rosenthal, his senior in employment. When Piasek joined the Government, the Union, and a number of employees in the prosecution, respondents might well have believed that further resistance to Rosenthal's reinstatement was pointless. But respondents' de-

cision to reinstate Rosenthal was not rendered unlawful by the circumstance that it occurred at a time when it was more acceptable to respondents than it might have been at another time. Responsibility for what happened must be laid to the Government, which placed Piasek's job in jeopardy by claiming that he had been unfairly preferred over Rosenthal, and then called Piasek as a witness against respondents so that respondents no longer had reason to resist the Board's demand for Rosenthal's reinstatement.

Other Board contentions justify only brief notice. For one thing, the Trial Examiner professed to discover evil significance in the fact that Board counsel was not consulted over the weekend of November 21 when it was decided to recall Rosenthal to work. [R. 115.] The point of that observation is not apparent. When consulted November 23 the Board's counsel refused to give an answer, and he was upheld in his refusal by the Trial Examiner; he did not respond until December 4, after two weeks deliberation. [R. 255-256, 364-365.] It would be impossible to run a factory under such supervision by Board counsel.

It is also contended that the finding of discrimination against Piasek is somehow supported by evidence to the effect that on November 14 Lewis telephoned one Greenberg, who formerly worked as a cutter at the Los Angeles plant and who testified: "He asked me if I was working and I said I am working and then I asked him if he straightened out with the union and he said we expect to get straightened out the beginning of next week so I may return and we may get together again." [R. 322.] It is argued that this testimony establishes an intention on Lewis' part to replace Piasek even before he testified

November 16 and merely on the basis of knowledge that he was going to testify. Yet Piasek admitted that on November 13, after respondents knew Piasek was to testify against them, Lewis asked Piasek to come back to work Monday the 16th and Piasek gave him an indefinite answer. [R. 108, 312.] The only testimony on the subject indicates that the decision to recall Rosenthal was reached over the weekend of November 21. If it occurred, the Lewis-Greenberg conversation was unrelated to the replacement of Piasek with Rosenthal. In the posture of the case as it then stood, with respondents being prosecuted for allegedly discriminating against Rosenthal in favor of Piasek, respondents had the right to replace Piasek with Rosenthal as they did. It would not make any difference if respondents had earlier considered replacing Piasek with Greenberg.

There was one job and two candidates, Rosenthal and Piasek. When respondents kept Piasek and let Rosenthal go they were prosecuted for alleged discrimination. When they took Rosenthal back and let Piasek go the same thing happened. The order to reinstate Piasek with back pay is not only unsupported by substantial evidence, but is absurd.

## Conclusion.

It is submitted that for the reasons stated the order to bargain, the order to pay back pay to Roark, and the order to reinstate Piasek with back pay are unsupported by substantial evidence on the record considered as a whole and are arbitarary and capricious, wherefore they should be set aside.

Respectfully submitted,

RICHARD A. PERKINS,

*Attorney for Respondents and Cross-Petitioners.*

## APPENDIX A.

Supplementing the statutory provisions set forth in the Appendix to the Board's Brief, the following relevant statutory provisions are set forth:

*Labor-Management Relations Act, 1947* (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * * * * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

*Administrative Procedure Act* (5 U. S. C. A. Secs. 1001-1011)

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * * * * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations * * *

## APPENDIX B.

(Excerpt from Brief for the National Labor Relations Board in *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), No. 13315, 206 F. 2d 730—footnotes omitted.)

(Pp. 27-32.)

Under the Taft-Hartley Act it is illegal (as it was under the Wagner Act) for an employer to encourage membership in a union by discriminating against employees who refuse to join. Under the Wagner Act, the one exception to this general ban was contained in a proviso to Section 8 (3), the familiarly known "closed shop proviso." Under this proviso an employer and a union representing all of the employees in a unit could voluntarily agree to require that only members of the union be employed by the employer.

Under the Taft-Hartley act the proviso was amended to read as follows:

> *Provided:* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

As amended, the proviso in effect bans the closed shop and permits only what is known popularly as a union shop. In a union shop, persons not members may be employed provided they join the union within the specified time. The net of the amendment is that no person may

be encouraged to join the union before the thirtieth day of his employment, or if an old employee, within thirty days after the execution of the union-security contract.

The contract executed by respondent and Local 3161 (AFL) (R. 731-733) contained union security provisions which exceeded those permitted by the proviso discussed above. Article III as substituted by Article XII provides that (R. 731): "all production and maintenance employees * * * shall at all times be members in good standing of the Union, subject to the following provisions as to newly hired employees." As the Board found (R. 118), this clause in effect requires "All present employees to be members in good standing" without according them the requisite thirty-day grace period within which to join following execution of the contract, and is hence illegal.

Moreover, the contract (R. 731) requires newly hired employees to obtain a working permit from the union or sign an application for membership in the union. Since this clause requires new employees to resort to some form of union process before the 30 day grace period it is also in excess of the proviso. It is irrelevant that the employees are not required to join before the 30th day. The proviso permits only one specific type of encouragement and that, only after a specified period has elapsed—a new employee may be required to join on or after the thirtieth day of his employment. It does not permit an employer, before the thirtieth day, to require new employees to obtain union work permits or to apply for union membership. In speaking of the proviso to Section 8 (3), the Supreme Court stated: "these words of the exception must have been carefully chosen to express the precise nature and limits" of permissible discrimination based

on union affiliation. *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 694-695; *N. L. R. B.* v. *Don Juan, Inc.,* 178 F. 2d 625, 627 (C. A. 2). By executing a contract which illegally discriminated against employees in a manner not permitted by the proviso respondent violated Section 8 (a) (3) of the Act.

Respondent's argument that the illegal clause was never enforced is beside the point. The mere execution of such a contract, even apart from its actual enforcement, constitutes "discrimination in regard to hire and tenure" on the part of the employer, and hence falls squarely within the prohibition of Section 8 (a) (3) of the Act. *Katz* v. *N. L. R. B.,* 196 F. 2d 411, 415-416 (C. A. 9); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B.* v. *Gaynor News Co.,* 197 F. 2d 719, 723-724 (C. A. 2); *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 660 (C. A. 9); see also *Donnelly Garment Co.,* 50 N. L. R. B. 241, 276, enforced, 165 F. 2d 940 (C. A. 8). This necessarily follows from the language of the section alone which, after prohibiting encouragement or discouragement of union membership "by discrimination in regard to hire or tenure of employment," provides that the "making" of a union-shop agreement shall not be illegal if the specified conditions have been met. As this Court held in *N. L. R. B.* v. *National Motor Bearing Co., supra,* the "making" of a closed shop contract with an unauthorized representative "was an unfair labor practice," prohibited by Section 8 (3) of the Act.

* * * * * * * * * *

The Board also concluded that respondent, by consenting to * * * the illegal union-security provisions, violated Section 8 (a) (2) as well as 8 (a) (3) of the

Act. Section 8 (a) (2) makes it an unfair labor practice for an employer to "contribute financial or other support" to any other labor organization. By agreeing to a clause which illegally encourages membership in a union respondent has supported Local 3161 (AFL) in every sense of the word. This type of support is just as real as an outright financial contribution and consequently violates Section 8(a)(2) of the Act. *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 414-415 (C. A. 9); *N. L. R. B.* v. *United Hoisting Co.*, 198 F. 2d 465 (C. A. 3); *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, 723-724 (C. A. 2).